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Our File: EB20200156

Attn: Christine Long, Registrar & Board Secretary

Dear Ms. Long:

Re: EB-2020-0156 – IGUA Motion to Review of EB-2019-0194 – SEC Submission

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No. 1, these are SEC's submissions on the motion to review brought by the Industrial Gas Users Association ("IGUA") relating to the cost allocation portion of the Ontario Energy Board's (the "Board") Decision and Order in Enbridge's 2020 rates application[1] (the "Decision"). As detailed below, SEC submits the motion should be denied.

Overview

One of the central aspects of incentive regulation is that rates are decoupled from costs. Periodically, that means that, if rates were re-set based on costs, those rates would be materially different. Some customers would pay more, and some customers would pay less. In some cases, the differences are substantial. As a result, SEC has some sympathy for the position of IGUA and the large customers it represents.

However, the benefits of the IRM can only be achieved if rates are set, not on the basis of cost, but on the basis of a formula. In this case, the tension between cost causality and IRM was even more pronounced, because at the time of the Enbridge/Union merger a new cost allocation was due. Instead, it was delayed for a further five years, and any divergences from cost were continued for that period.

The Board was faced in the Decision with allowing the decoupling of costs and rates to continue until 2024, as originally ordered in the MAADs decision, or adjusting rates based on a partial review of the allocation of costs. A cost allocation adjustment based on only a subset of costs is rarely a good idea, and something the Board usually resists. Implementation of the partial review would have seen very significant rate increases to most non-large volume customers in the Union

[1] *Decision and Order* (EB-2019-0194 – Enbridge 2020 Rates), May 14, 2020 ["*Decision*"]

Rate Zone, which would have undermined a key aspect of incentive regulation, rate stability and predictability.

Against this background, SEC submits the Board should deny the motion.

First, the motion does not pass the threshold test, as it is simply an attempt by IGUA to re-argue its position before another panel of the Board, after it was already fully argued in the original proceeding.

Second, even if the Board determines the motion passes the threshold test, the Decision should be upheld on the merits. The Board decided to defer cost allocation changes until rebasing, when Enbridge will be required to undertake a full cost allocation study of its entire merged system. This was appropriate in the context of the IRM and proper cost allocation, and to limit large swings in rates over a short period of time.

Threshold Test

Pursuant to Rule 43.01 of the Board's *Rules of Practice and Procedure*, the Board conducts a threshold inquiry to determine whether the matter should be reviewed on the merits. The threshold test was articulated by the Board in the Motion to Review Natural Gas Electricity Interface Review ("NGEIR") Decision.[2] The Board stated that the purpose of the threshold test is to determine whether the grounds relied upon by the moving party raise a question as to the correctness of the Decision, and whether there is enough substance to the issues raised that a review based on those issues could result in the Board varying, cancelling or suspending that decision.[3] The grounds listed in Rule 42.01(a) are not exhaustive, but in order for the threshold test to be met, there must be an "identifiable error"[4] and the "review is not an opportunity for a party to re-argue the case".[5] The Divisional Court has confirmed the Board's principle that re-argument of issues is not an appropriate grounds for review.[6]

A review of the submissions made before the hearing panel by all parties, and a review of the alleged errors, demonstrates that IGUA has not met the threshold test. The grounds for its motion are premised not on an actual identifiable error, but based on allegedly insufficient or inadequate reasons in the Decision. IGUA has not raised an error of fact, or an error of law, or a change of circumstances, that if corrected would result in the Board varying the Decision. IGUA says, instead, that by failing to provide acceptable reasons for rejecting the arguments of IGUA, the hearing panel committed an error of law. That is not correct.

IGUA bases its motion to review on the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (*"Vavilov*").[7] The *Vavilov* decision sets out a

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[2] *Decision with Reasons* (EB-2006-0322/338/340 - NGEIR Motion to Review), May 22, 2007 ["*NGEIR*"], Also see *Decision and Order on Motion to Review* (EB-2013-0193 - Milton Hydro Motion to Review), July 4, 2013, p.4; *Decision on Motion to Review Decision and Order* (EB-2013-0331 - NAN), January 16, 2014), p.6

[3] *NGEIR*, p.18

[4] *NGEIR*, p.14

[5] *NGEIR*, p.18

[6] *Grey Highlands (Municipality) v. Plateau Wind Inc.*, 2012 ONSC 1001, para. 7

[7] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ["*Vavilov*"]

revised framework for how reviewing courts should review administrative decisions on appeals and judicial reviews. While there are many important and helpful comments in the decision that should be considered by administrative decision-makers in reaching their decisions, non-conformity with some of the expectations in *Vavilov* are not themselves an error of law, as alleged by IGUA.

The Board has previously agreed that errors of law are grounds for a motion to review[8], but insufficiency or inadequacy of reasons are not themselves a standalone ground for such a review, as they are not in and of itself errors of law. Reasons are to be considered within the context of the review of the reasonableness of the alleged error of fact, law, and/or discretion.[9] Courts have confirmed that *Vavilov* has not changed the law on this point.[10] It is not sufficient to point out that the reasons are insufficient. To be reviewable, defects in the reasons must undermine the reasonableness of the decision.

A review of the underlying issues raised by the motion show there was no such substantive error. IGUA is unhappy with the conclusion that the Board reached with respect to the issue of the cost allocation of the Panhandle costs. It is not an "identifiable error" to reach a different conclusion as one of the parties. It is only an identifiable error if IGUA can show that the Board's decision on the issue was premised on some factual, legal, policy or similar type of mistake. IGUA has not shown any such mistake. It simply disagrees with the result.

The Decision

A motion to review is not a hearing de novo.[11] It is a review, and in that context the original hearing panel, which had the benefit of considering the evidence firsthand, is entitled to deference by a reviewing panel. The Board has consistently found that the reviewing panels must provide "deference to the original hearing panel."[12] It has also previously said that "[a] reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and [it] is clearly wrong."[13]

Giving deference to the findings and conclusions of the original hearing panel is especially important in the rate-setting context, where there is almost never a clear 'right' or 'wrong' answer. Most decisions the Board makes require the balancing of various competing considerations and interests. Rates are set based on judgment. Sometimes, for example, different panels looking at similar evidence will reach different outcomes, and both are reasonable. It is why the Board should

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[8] *Decision and Order on Motion to Review and Vary* (EB-2014-0155 - SEC Motion to Review of KWHI), July 31, 2014, p.5

[9] *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 22

[10] *Mayer v The Superintendent Of Motor Vehicles*, 2020 BCSC 474, para. 45; See also *Ewanek v. Winnipeg (City of) et al.*, 2020 MBQB 98, paras. 43-44

[11] *Decision with Reasons* (RP-2004-0167/EB-2005-0188 - Natural Resource Gas Ltd. Motion to Review), October 6, 2005, p.7

[12] *Decision and Order (*EB-2018-0085 - OPG Motion to Review), August 30, 2018, p.5; See also: *Decision and Order* (EB-2016-0225 - Milton Hydro Motion to Review), February 22, 2018, p.10

[13] *Decision and Order* (EB-2009-0063 - Brant County Power Inc. Motion to Review), August 10 2010, para. 35

ensure on a motion to review the hearing panel is given deference to its findings and its exercise of discretion.

SEC does not dispute that the limited cost allocation study which was previously directed to be undertaken by Enbridge and filed with the Board in the 2020 rates proceeding, indicated that, if rates were re-set based on cost , there might have been a substantial rate decrease to some customers in certain large-volume rate classes.[14] At the same time, that evidence suggests that other customers in the Union Rate Zone would see a significant rate increase.[15]

In its application, Enbridge proposed delaying the implementation of the changes until rebasing in 2024 to avoid a large swing in rates in 2020, which would likely be followed by a further swing in costs between rate classes when Enbridge undertakes a full cost allocation study for its entire system. Their argument was that whipsawing rates is not good ratemaking.

SEC agreed with the position of Enbridge that it should not make any cost allocation changes at this time and should instead wait until rebasing when the company would be required to undertake a full cost allocation review. In its submission before the hearing panel, SEC noted that since cost allocation is interactive, it is normally preferable to implement cost allocation changes only in the context of a full study, except in the most unusual of circumstances.[16] That is especially true with a merged entity like Enbridge, where there will be a major cost allocation study for the entire merged system for 2024. If the limited cost allocation study in this proceeding had been implemented as IGUA has argued, most Union Rate Zone customers could see a large swing in rates in 2020, but then another in 2024 based on a full review of cost allocation. The Board recognized that this is not a preferred approach. Cost allocation is best done comprehensively in any case, and the IGUA proposal undermines the principle of rate stability by having two significant changes in such a short window.

IGUA is correct that the appropriate cost allocation of the Panhandle System has a lengthy history, but it was not until the partial cost allocation study was filed in the 2020 rates proceeding, that the Board and parties understood the actual implications on rates of an adjustment to the methodology. In previous applications, IGUA had raised this issue regarding the disconnect between the 2013 approved study as it related to the Panhandle System costs, but at no time did the Board or parties ever have the detailed information to determine the impact of an alternative approach that would address some of the existing inequities.

In the MAADs decision the Board ordered Enbridge to undertake a limited cost allocation study, to be filed in the 2020 rates application. This would then allow the Board to consider the issue of

[14] EB-2019-0194, Interrogatory Response I-Staff-4, Attachments 1-4,

[15] Delivery charge increases of 19.4% (Small Rate 10), 22.3% (Large Rate 10), 7.2% (Small Rate M2), 8.5% (Large Rate M2),~30% (Rate M4), ~6.3% (Rate M5), ~31% (M7), 12% (T1) (See EB-2019-0194, Interrogatory Response I-Staff-4, Attachments 1-4). Since some of these Union Gas Rate Zone large costs are a flow-through to Enbridge Rate Zone customer transportation rates, there would be a slight rate decrease for them, albeit not a material one. (See EB-2019-0194, Interrogatory Response I.FRPO.19, Attachment 1; Interrogatory Response I.SEC.8)

[16] EB-2019-0194, SEC Submissions, dated August 6, 2020, p.3-4

cost allocation of certain major projects, including the Panhandle, with at least some evidentiary basis.

It is understandable that IGUA hoped 2020 would be the point at which the cost allocation of Panhandle would be "fixed", but the Board never said it would implement the results of a future study, or a modified version of it, in the 2020 rates application. It would have been irresponsible of them to do so, since they did not know what the actual impact of any revised methodology was going to be and specifically, the reallocation of the Panhandle System costs to various customer classes. IGUA asked the Board in the MAADs decision to make an exception to the normal process that cost allocation is done at rebasing. The Board's response was effectively to require Enbridge to undertake a partial cost allocation study to determine if an exception would be made. The Board never ordered, or making it a condition of the merger approval, that the results be implemented in 2020, only that a study would need to be filed.

Faced with actual evidence regarding the impacts on all of the affected Enbridge customers, not just those in the large volume rate classes, the Board agreed with Enbridge, SEC and other parties, not to implement the changes suggested by the limited cost allocation study. The Board recognized that costs and benefits between rate classes since Union Gas' approved 2013 cost allocation study had changed, but that it must balance that fact against the rate stability and predictability, especially as Enbridge is under incentive regulation:

> The OEB acknowledges that the existing cost allocation over time has resulted in changes to the costs and benefits to certain parties since the OEB approved Union Gas's 2013 cost allocation study. Accordingly, Enbridge Gas responded to the OEB's direction in the MAADs Decision to undertake a new cost allocation study. However, the OEB notes that, consistent with the approved rate setting mechanism, the rates for 2020 continue to be decoupled from costs. Rate stability and predictability offered through incentive regulation also rely on the decoupling of rates from the allocating utilities' costs among different customer classes. At the next rebasing, potential changes to the comprehensive cost allowance are anticipated including other adjustments to rate base, possible rate harmonization proposals and rate design changes.[17]

The Board in its finding explicitly noted IGUA's argument, and found that even though the 2013 cost allocation study was out of date, selective changes to cost allocation, which would occur in these circumstances where only certain projects are part of the study, would harm rate predictability, especially when further changes are likely to occur when a full cost allocation study is undertaken for 2024 rates.

> IGUA promoted the removal from rates T2, M16 and C1 of the Panhandle system costs identified in the cost allocation study as being inappropriately and inequitably recovered from these customers. Enbridge noted the Panhandle Reinforcement Project was unique as it involved incremental costs not considered in the 2013 cost allocation study. The OEB acknowledges that the current cost allocations are outdated; however, attempting to make selected changes at this time will be disruptive to the predictability of rates and result in more changes in 2024. The OEB reiterates that rate stability and predictability offered through incentive

[17] *Decision*, p.17

> regulation rely on the decoupling of rates from the allocating utilities' costs among different customers classes.[18]

This was the appropriate and reasonable balancing of competing interests between customer classes that the Board must always undertake when it sets just and reasonable rates. There is no correct answer. The choice to implement the results of the cost allocation study for 2020 as proposed by IGUA, versus deferring until a full study is undertaken for 2024 rates, is an exercise of judgment. They are both reasonable outcomes that can be reached based on the evidence. The Board did not make its decision based on a misapprehension of the evidence or misapplication of any regulatory principle. It simply exercised its discretion in a way that was unfavorable to IGUA. There was ample evidence on the record to support the outcome the Board reached.

IGUA's characterizing of the Decision on the cost allocation issue as "one page of perfunctory reasons" is unfair.[19] After the Board went through three pages of review of the positions of the parties, the one-page *findings* portion of the Decision clearly lays out the Board's rationale for not agreeing with IGUA's view on the question of the implementation of the cost allocation study at this time. *Vavilov* makes clear that administrative-decision makers are not required to make findings regarding every argument made by parties. In fact, *Vavilov* notes that doing so would be counter-productive:

> Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice.[20]

What *Vavilov* does require is that administrative decision-makers "meaningfully grapple with key issues or central arguments raised by the parties."[21] The Board did exactly that. It recognized IGUA's central contention that the current allocation of the Panhandle Project costs was unfair to certain large volume customer classes. It just did not agree that on balance it was appropriate to implement the changes now, when considering other factors. Not including a regurgitation of the history of the issue, and a discussion of every argument made by all parties, does not render the Board's discretion unreasonable. Any fair reading of the Decision drives the conclusion that the Board engaged the key issues, and exercised its discretion based on the evidence before it uses known ratemaking principles.

As the Alberta Court of Appeal recently noted in *Edmonton (City of) v Edmonton Police Association* regarding the application of *Vavilov,* it was not meant to "be read like a checklist or a straightjacket to which reasons must conform."[22] In that decision, the Court found that five

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[18] *Decision*, p.18

[19] IGUA Submissions on the Motion, para. 4; See also paras. 22, 39

[20] *Vavilov*, para. 128

[21] *Ibid.*

[22] *Edmonton (City of) v Edmonton Police Association*, 2020 ABCA 182, para. 27

paragraphs of analysis by the arbitrator, while short, did "not necessarily mean that the arbitrator did not engage with the issues."[23] Here, the Decision may not be as long as IGUA appears to have wanted, but it did engage with the important elements of the issue.

To be clear, nothing in these submissions should be taken as SEC saying that it is not important for the Board to ensure that its reasons for decisions are as comprehensive as can reasonably be expected. But simply because the Board has not done so does not render a Board decision unreasonable. In the words of *Vavilov*, "written reasons given by an administrative body must not be assessed against a standard of perfection".[24] While the Board should strive for perfection, it is not the standard it has to meet. *Vavilov* provides a useful guide to administrative decision-makers, including the Board, on the importance of reasons, but it is not a sufficient basis to grant this motion to review. The hearing panel exercised its discretion reasonably and, on that basis, IGUA's motion should be dismissed.

Relief

SEC submits the motion should be dismissed. If the Board does agree with IGUA that the Decision was unreasonable due to the defects in its reasons, that does not mean that the proposed relief sought is appropriate. The matter should be sent back to the original hearing panel to reconsider the issue based on the evidence and arguments already on the record.

All of which is respectfully submitted.

Yours very truly,
Shepherd Rubenstein P.C.

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cc: Wayne McNally, SEC (by email)
IGUA, Enbridge and intervenors (by email)

[23] *Ibid.*

[24] *Vavilov*, para. 91